The Shopfront

YOUTH LEGAL CENTRE

Age of consent: issues for youth workers

1 What is the age of consent?

The crime of sexual assault is a familiar concept to most people. It is an offence to have sexual intercourse with a person without their consent.

The age of consent is an age at which a young person is deemed capable of consenting to sex. In New South Wales, this age is fixed by legislation at 16 for both homosexual and heterosexual intercourse. This means that anyone who has sex with a child under the age of 16 is committing an offence, whether or not the under-16-year-old actually consents.

It is important to understand that the law does not prohibit under-16-year-olds from having sex! The law prohibits people from having sex with under-16-year-olds. So, if an 18-year-old has sex with a 15-year-old, the 18-year-old is guilty of an offence and the 15-year-old is the victim.

The law gets really confusing (and unworkable) where both partners are under 16. Technically both are committing an offence and both are the victim! What happens in practice depends on the degree of age difference and power imbalance between the young people. If both young people are similar in age and the relationship appears to be consensual, it is very unlikely that either would be charged with an offence. If one young person is significantly older than the other, or has abused or exploited them in some way, this person will probably be charged.

2 Offences involving under-age sex

These are some of the offences involving sexual contact with children under the age of consent:

(a) Sexual intercourse with a child aged under 10 years (*Crimes Act 1900* section 66A) – maximum penalty 25 years imprisonment (life imprisonment in circumstances of aggravation)

(b) Sexual intercourse with a child aged 10-13 years (*Crimes Act 1900* section 66C) – maximum penalty 16 years imprisonment (20 years imprisonment in circumstances of aggravation)

(c) Sexual intercourse with a child aged 14-15 years (*Crimes Act 1900* section 66C) – maximum penalty 10 years imprisonment (12 years imprisonment in circumstances of aggravation)

(d) Sexual intercourse without consent where victim is aged under 16 years (aggravated sexual assault) (*Crimes Act 1900* section 61J) - maximum penalty 20 years imprisonment

(e) Indecent assault of a child aged under 16 years (Crimes *Act 1900* section 61M) – maximum penalty 10 years imprisonment

(f) Act of indecency with or towards child aged under 16 years (Crimes *Act 1900* section 61N) – maximum penalty 2 years imprisonment

(g) Aggravated act of indecency with or towards child aged under 16 years (Crimes *Act 1900* section 61O) – maximum penalty 5 years imprisonment

(h) Act of indecency with or towards child aged under 16 years, knowing it is being filmed for purpose of child pornography (Crimes *Act 1900* section 61O) – maximum penalty 10 years imprisonment

(i) Act of indecency with or towards child aged under 10 years (Crimes *Act 1900* section 61O) – maximum penalty 7 years imprisonment

Circumstances of aggravation include where the offender maliciously inflicts or threatens to inflict actual bodily harm on the victim by means of an offensive weapon; where the offender is in the company of other people; where the victim is under the authority of the offender; where the victim has an intellectual or physical disability; or where the offender took advantage of the victim being under the influence of drugs or alcohol.

3 Under-age sex – do you have to report it to DOCS?

Most people who work with children are mandatory reporters under the *Children and Young Persons (Care and Protection) Act 1998.* Section 27 of the Act requires you to make a report to DoCS if:

(a) you are employed in (or are responsible for) the delivery of certain services (eg health, education, accommodation, welfare, law enforcement) wholly or partly to children; and

(b) you have reasonable grounds to suspect that a child under 16 is (or a class of children are) at risk of significant harm; and

(c) those grounds arise during the course of your work.

According to section 23 of the Act, a child or young person is "at risk of significant harm" when one or more of the following factors are present to a significant extent:

> (a) the child or young person's basic physical or psychological needs are not being met or are at risk of not being met,
>
> (b)the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or the young person to receive necessary medical care,
>
> (b1) in the case of a child or young person who is required to attend school, the parents or caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive education;
>
> (c) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,
>
> (d) the child or young person lives in a household where there have been incidents of domestic violence, and as a consequence, the child or young person is at risk of serious physical or psychological harm,
>
> (e) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,
>
> (f) the child was the subject of a pre-natal report and the birth mother did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

Technically, an under-16-year-old involved in sexual activity is a victim of an offence. Some people think this means they are being sexually abused and are therefore "at risk of significant harm" as defined by the act.

The more widely-held view (which we share) is that consensual under-age sex does *not* necessarily amount to abuse or risk of significant harm within the meaning of the Act.

The *NSW Inter-Agency Guidelines for Child Protection Intervention 2006 Edition* (http://www.community.nsw.gov.au/for_agencies_that_work_with_us/child_protection_services/interagency_guidelines.html) makes it clear that under-age sexual activity does not necessarily amount to abuse.

The following passage is from section 2.3.4 of the Guidelines, "Indicators of sexual abuse":

> "Physical and psychological coercion of children is intrinsic to child sexual assault and differentiates such assault from consensual peer sexual activity. Adults, young people and children who perpetrate child sexual abuse exploit the dependency and immaturity of children by misusing their power and encouraging children to be secretive."

4 Under-age sex – do I have to report it to the police?

Section 316 of the *Crimes Act* (NSW) says that if:

(a) a serious offence has been committed; and

(b) you know or believe it has been committed: and

(c) you know or believe you have information which could assist in the apprehension or conviction of the offender; and

(d) you fail, ***without reasonable excuse***, to bring this to the attention of the police or other appropriate authority;

you are guilty of an offence and could face up to 2 years imprisonment (or 5 years if you conceal the offence in return for some personal benefit).

A "***serious offence***" is defined in section 311 as an offence punishable by imprisonment of 5 years or more. This would include all of the sex offences mentioned above.

The Act does not say what amounts to a "***reasonable excuse***", but in our view it would probably include the need to protect trust and confidentiality with your client.

Further, the consent of the Attorney-General is required before prosecuting someone whose knowledge or information was obtained "in the course of practising or following a profession, calling or vocation prescribed by regulations for the purpose of this section".

The professions prescribed by the regulations are: legal practitioners, medical practitioners, psychologists, nurses, ***social workers*** (including ***support workers for victims of crime*** and ***counsellors*** treating people for emotional or psychological conditions), members of the clergy of any church or religious denomination, and researchers for professional or academic purposes.

Although "youth worker" is not on the list of professions, it is likely that a youth worker would be treated in a similar way to a social worker or a counsellor.

It is therefore very unlikely that a youth worker or health worker would be charged with this sort of offence.

Even if you are charged, this does not necessarily mean you will be found guilty. You may succeed with an argument that client confidentiality gives you a reasonable excuse for not disclosing.

Of course, if you are concerned about being charged with this offence, or are unsure about whether to report a matter to the police, you should seek legal advice.

5 Providing sexual health services – are you aiding or encouraging a crime?

It is an offence to "aid, abet, counsel or procure" the commission of a crime. This means assisting or encouraging someone to commit an offence.

Providing condoms, lube, dams or sexual health information does not mean you are assisting or encouraging a young person to have sex, as long as the ultimate decision rests with the young person.

Also bear in mind that a young person under 16 is not committing an offence by having sex (unless the other partner is also under 16, in which case the older or more powerful of the two would usually be considered the offender, and the other the victim).

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